SUPREME COURT, U. S.

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-848

FRANK J. TEDESCO,

Petitioner,

vs.

THE CINCINNATI GAS & ELECTRIC COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

RICHARD H. PENNINGTON
BRUMLEVE, DeCAMP & WOOD
1420 Central Trust Tower
Cincinnati, Ohio 45202

Of Counsel:
EDWIN J. DREIBELBIS
Attorneys for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether or not petitioner had presented facts to warrant submission of the case to a jury as governed by Ohio's safe place to work statute.

2. Whether the Court of Appeals has power to enter a final judgment for an appellant, thereby reversing a jury verdict, when it finds that a motion for a directed verdict should have been sustained by the trial court.

STATEMENT OF THE CASE

The plaintiff was a first-class electric lineman with twenty years experience in the servicing and installation of high tension electric lines.

On October 10, 1963, he was employed by the Hoosier Engineering Company. Hoosier Engineering had contracted with defendant Cincinnati Gas & Electric Company to replace electric service in the Mainville, Warren County, Ohio area. Hoosier had agreed to provide the work crews and supervisors for this installation, while the Cincinnati Gas & Electric Company provided materials.

The Accident

Plaintiff had climbed a pole to do certain work. Upon completion of this work he started to climb down when the electric wires started to arc or short circuit. He was surprised because these lines were not supposed to be energized and, instead of holding to the pole, he grabbed the wire, which separated; and he fell. Petitioner was not wearing his safety belt at the time.

The Negligence Claimed

Judge Hogan, the trial judge, removed all issues from the jury's consideration other than whether or not Cincinnati Gas & Electric provided plaintiff with a reasonably safe place to work. Plaintiff, in his petition and answer to interrogatories, alleged three areas in which defendant failed to provide plaintiff with a reasonably safe place to work, namely, in providing a ragged and burred pole rack; in providing defectively insulated wiring; and in providing an overfused transformer.

With respect to providing a ragged and burred pole rack

Upon each telephone pole a metal rack is placed for carrying electric wires. This rack is designed to hold three large ceramic insulation spools to which the wires are attached. The sole purpose of these insulation spools is

to prevent the wires from coming into contact with the metal rack.

At the time of plaintiff's fall, the electric wires had not been secured to the ceramic spools, although electrical current was passing through the wires. If the wires had been attached to the insulators then the arc resulting from the short-circuit would not have occurred.

It was the responsibility of the plaintiff and his crew to see that the insulators are connected to the rack and the wire fixed to them to protect the wires from coming into contact with the rack.

The trial court found as a matter of law that the product had not been put to its intended use.

With respect to providing defectively insulated wiring

The ruling of the trial court that the rack and its component parts had not been put to their intended use as a matter of law likewise included the wire.

With respect to the overfused transformer

Following the accident, one of the witnesses testified that the wire which had separated continued to arc until a transformer supplying power to the pole involved had been deenergized.

The specifications provided by Cincinnati Gas & Electric Company called for a 25-amp fuse. However, the crew of which plaintiff was a member (which consisted of all Hoosier employees) had placed a 100-amp fuse in the transformer.

Court of Appeals findings with regard to the three allegations

In its opinion, the Court of Appeals, made this comment:

> "Plaintiff's case then boils down to the undisputed facts that it was a Hoosier crew member who turned

on the current, energizing the lines, before the wires were attached to the insulators. It was a Hoosier crew member who installed the wrong fuse in the cut-off box. Had the wires been properly attached to the insulators, plaintiff would not have been injured.

However, there is more. Hoosier had provided safety measures for its employees, which measures would have prevented the accident had they been used." (Pages 25 and 26 of the Petition)

Again, the Court of Appeals stated in its rehearing order:

"It is clear that Tedesco (petitioner) had full knowledge of the hazard involved in the installation of the pole and wires and that he did not utilize the safety equipment supplied to him by his employer for his own protection." (Page 34 of the Petition)

The District Court submitted the case to the jury, which returned a verdict against the respondent. Judgment was entered. The respondent appealed contending that the Court erred in denying its motion for a directed verdict, made at the close of the petitioner's evidence and at the close of all the evidence, and erred in denying its motion for judgment notwithstanding the verdict. The case is governed by Ohio law. The Sixth Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with instructions to dismiss the Complaint. The petition for rehearing was denied.

ARGUMENT

I.

The obligation imposed by the Frequenter Section of the Ohio Safe Place to Work Law is that imposed by a business invitor upon its invitee. This obligation was stated in the case of *Davis* v. *The Charles Shutrump & Sons Co.*, 140 Ohio St. 89, as follows:

> "Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while the work is in the course of performance, a servant of the contractor is an invitee and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, only if the principal employer has, and the servant has not, actual or constructive notice of the existence of such condition."

The cause of the arc which occurred while plaintiff was climbing down the pole was never determined. It was inferred that it occurred because of a rough place on the pole rack. There were other equal probabilities. It was likewise inferred that, after the arc, the fuse previously described did not operate.

The essence of this entire case is the knowledge of the employer and the lack of knowledge of the owner.

In the case of *Wellman* v. *East Ohio Gas Co.*, 160 Ohio St. 103, the Court stated:

> "Most of the cases cited and relied on by plaintiff involved a situation where an independent contractor and his employees entered upon the premises of the owner or occupier thereof, at his invitation, to perform work for him, unaware and uninformed as to a dangerous condition on the premises created by the owner or of which he had knowledge."

The Court in the *Wellman* Case went on to state:

> "The rule of general acceptance is that where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches . . ."

In that particular instance, the independent contractor had been engaged to lay gas pipes. As an incident to the performance of that work, a pipe was attached to a high-pressure gas main and during a welding process the cap blew off due to pressure of gas, thereby injuring the plaintiff. As previously stated, the Court held that this was an incident of the work. Later, the Ohio Court, in *Schwarz* v. *The General Electric Company,* 163 Ohio St. 354, stated that, although the owner owes the employee:

> "the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use, this duty is not extended, however, to any inherent hazards necessarily present because of the character of the work to be done."

In the case of *Comerford* v. *Jones & Laughlin Steel Corp.,* 170 Ohio St. 117 (an opinion written by Judge Peck, now a judge on our Sixth Circuit Court of Appeals) where the employee of the subcontractor was injured by the fall of a scaffold when one of the casters rolled into a slight depression and it was demonstrated that the casters' braking devices were not operative and that this scaffold had been assembled by plaintiff's foreman and fellow employee of plaintiff, the Court held, after considering issues as to control, that such a fact situation more closely patterned the cases of *Davis* v. *Shutrump, Wellman* v. *East Ohio Gas* and *Schwarz* v. *General Electric,* all *supra.* See also *Evans* v. *Whirlpool CPRO.,* 10 Ohio St. (2d) 240; *Bates* v. *Cleveland Illuminating,* 85 Ohio Law Abs. 345.

There is a line of cases in Ohio following *Bosjnak* v. *Superior Steel,* 145 Ohio St. 538, in which the Ohio courts have held the person in control to the obligation as follows:

> "An employee of an independent contractor while engaged in the erection of a building upon premises, the possession and control of which are retained by

the owner, is an invitee to whom the owner owes the duty of exercising ordinary care to maintain the premises in a reasonably safe condition for use in a manner consistent with the invitation and to inform the invitee of hazardous conditions of the premises and of activities thereon unknown by and not obvious to the invitee."

Just this last year, the Supreme Court of Ohio, in the case of *Moore* v. *Denune*, 26 Ohio St. (2d) 125, again stated:

> "In the recent case of *Debie* v. *Cochran Pharmacy-Berwick* (1967), 11 Ohio St. 2d 38, this court approved the holding in *Ford Motor Co.* v. *Thompson* (1956), 229 F. 2d 873. In the *Ford* case, the court enumerated and considered the many cases interpreting the frequenter statutes. It held, at page 879, as follows:
>
> > "'* * * The simple fact seems to be that, at least with respect to 'frequenters,' the Ohio appellate courts have not regarded those statutes as exacting a duty substantially different from that imposed generally by Ohio law upon an owner of property towards an invitee.'
>
> "The *Ford* case also quoted the first paragraph of the syllabus of *Davis* v. *Charles Shutrump & Sons Co.* (1942), 140 Ohio St. 89, which reads as follows:
>
> > "'Where the premises upon which construction work is to be performed by a contractor remains under the control of the principal employer while the work is in the course of performance, a servant of the contractor is an invitee and as such entitled to recover from the principal employer for any injury which he may sustain by reason of the abnormally dangerous condition of the premises, only if the principal employer has, and the servant has not, actual or constructive notice of the existence of such condition.'"

The instant case, we believe, most closely aligns itself with *Davis, Wellman, Schwarz* and *Comerford* cases, *supra*. The rack which petitioner claims was rough and suggests was a causative factor, was not put to its intended use. The insulator spools which were available should have been used to keep the wire from the rack; and this accident would not have occurred had plaintiff used these spools in connection with the rack as the specifications required.

Indeed, Judge Hogan, (the trial judge) realized this fact and ruled that this product had not been put to its intended use as a matter of law. In the case of *Hooker* v. *Kroger Company*, 12 Ohio App. (2d) 105, the Court stated:

> "The duty of the owner or proprietor of a business to furnish appliances free from defects for the safety of invitees is limited to the defects from the intended use of those appliances."

Moreover, this hazard was a hazard created by the independent contractor and his employees as a matter of law, as suggested in the *Schwarz* case. Likewise, the testimony was that the fuse did not break because, although the specifications called for a 25-amp fuse, a 100 amp fuse was placed in the receptacle, again giving rise to application of the *Schwarz* case. Moreover, it should be remembered that, whether or not the rack wire or fuse produced this accident, the fact still remains that the petitioner climbed this pole while the wires were energized and while he had not made any determination in this regard and had assumed that there was no energy in the wires.

In addition, protective equipment provided for the lineman, was not used by petitioner. Likewise, the petitioner himself testified directly that electrical energy presented a real hazard to an electrical lineman.

II.

Petitioner contends that it should not be the function of the Court to direct a verdict because of insufficient evidence, suggesting that this violates petitioner's constitutional rights under the Seventh Amendment of our constitution. However, we believe that the case of *Galloway* v. *U.S.*, 319 U.S. 372, is controlling. Our Court stated in that case at page 393:

> "The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right."

The respondent has complied with the provisions of Rule 50 (b) F.R.C.P.

The Court of Appeals accepted its duty of determining the legal sufficiency of the evidence. The several opinions returned by Judge Weick should be given special weight in this case as he is a member of the Ohio Bar and was a District Judge in Ohio before appointment to the Sixth Circuit Court. *Berhardt* v. *Polygraphic Co.*, 35 U.S. 185.

Hence, the petitioner's case fails because there was absolutely no evidence showing any knowledge on the part of the respondent of any defective condition on the premises. The question now presented to the Supreme Court is not novel. Indeed, the Court in *Galloway (supra)* reviews the common law rights under the Seventh Amendment and those rights back to 1791. Prior to the *Galloway* case the same question had been presented to this Court on many occasions. Therefore, we respectfully submit to the Court that this question is not of specific importance be-

cause the Sixth Circuit Court of Appeals correctly interpreted the Ohio law and had the benefit of a very recent case from the Supreme Court of Ohio at the time of the hearing.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD H. PENNINGTON
and
EDWIN J. DREIBELBIS
of
BRUMLEVE, DeCAMP & WOOD
1420 Central Trust Tower
Cincinnati, Ohio 45202
513/721-1350

Attorneys for Respondent